Odebrecht Contractors of Florida, Inc. *and* International Union of Operating Engineers, Local 487, AFL–CIO, Petitioner. Case 12–RC–8164

August 10, 1998

DECISION AND ORDER DENYING APPEAL

BY CHAIRMAN GOULD AND MEMBERS FOX, LIEBMAN, AND HURTGEN

The Employer's request for review[1] and stay of mail ballot election is denied. Contrary to the Employer's contention, there is no statutory requirement or other rule that the Regional Director's decision to conduct the election by mail ballot be contained in the Decision and Direction of Election. Thus, we find nothing improper in the Regional Director's notification to the parties by letter of this decision. We, like our dissenting colleague, are troubled, however, by the Regional Director's failure to articulate her rationale for conducting the election by mail ballot, and we cannot in these circumstances defer to the Regional Director's decision. Nevertheless, we disagree with our dissenting colleague's proposition that the Board cannot *decide* this issue unless it knows the bases for the Regional Director's decision.

Under the statutory scheme, the National Labor Relations Board unquestionably has the authority to decide whether to conduct an election by mail ballot, and our authority is in no way diminished by virtue of our usual delegation of such issues to the Regional Directors. Thus, although we might choose in some cases where the Regional Director has failed to articulate his or her rationale to remand the case to the Regional Director for further appropriate action, under the circumstances of this case, we find that the record before us is sufficient for us to decide this issue, and we find that an election by mail ballot is appropriate.

In this case, the Regional Director directed an election among all heavy equipment operators and heavy equipment mechanics employed by the Employer in Dade County, Florida. She further directed that voting eligibility would be determined by the formula in *Daniel Construction Co*., 133 NLRB 264 (1961).[2] The Board denied review of the Director's Decision and Direction of Election on January 5, 1998.

The Employer presently employs unit employees on four jobsites in Dade County, but it is unclear from the record the exact size of the Employer's current work force.[3] The *Excelsior* list submitted by the Employer, however, contains 40 names of eligible voters,[4] and it thus appears that a substantial number of eligible voters are not presently employed by the Employer at its Dade County jobsites. Contrary to the assertion of our dissenting colleague, we are "sure" of enough facts to conclude that a significant number of eligible voters are "scattered" within the meaning of the Casehandling Manual, and within the meaning of the guidelines we have set forth in *San Diego Gas & Electric*, 325 NLRB 1143 (1998). Comparing the Employer's estimate of the number of employees working at its four jobsites (25) with the number of eligible voters on the Employer's own *Excelsior* list (40), shows that there are at least 15 eligible voters who do not currently work at any of its jobsites. Thus, assuming the truth of the Employer's own allegations, a significant number of eligible voters are not working at any of its jobsites and thus, by definition, would have to travel at least some distance to vote if the election were held at one of the jobsites. In addition, the Employer's jobsites themselves are located from 8 to 30 miles from each other, which poses additional scheduling difficulties for a manual election. Under these circumstances, we find that the eligible voters are sufficiently "scattered" over significant distances to warrant an election by mail ballot. See Casehandling Manual (Pt. Two) Representation, Section 11336 ("Particularly where long distances are involved, or where eligible voters are scattered because of their duties, the possibility [of mail ballots] should be explored.") See also *San Diego Gas & Electric*, supra, slip op. at 3. Accordingly, we deny the Employer's request for review.

CHAIRMAN GOULD, concurring.

I join my colleagues in denying the Employer's request for review and stay of mail ballot election, and agree that there is nothing improper in either the Regional Director's decision to direct a mail ballot election in the circumstance of this case or in the Regional Director's notification to the parties by letter of this decision. As I have previously stated,[1] I would find the use of mail ballots appropriate in all situations where the prevailing conditions are such that they are necessary to conserve Agency resources and/or enfranchise employees. In contrast to my colleagues in the majority, however, I am not troubled by the Regional Director's failure to articulate the basis for her decision. It is undisputed that it is within the Regional Director's discretion to determine the election procedure, whether manual or mail ballot. In my view, once the election procedure has been set, the

[1] Although the document filed by the Employer is entitled a request for review, we have treated it as a request for special permission to appeal the Regional Director's decision to conduct a mail ballot election since that decision was not contained in the Decision and Direction of Election.

[2] The *Daniel* formula provides that in the construction industry, in addition to those eligible to vote under standard criteria, unit employees are eligible if they have been employed by the employer for at least 30 days within 12 months preceding the eligibility date for the election or if they have had some employment in those 12 months and have been employed for at least 45 days within the 24-month period preceding the eligibility date.

[3] In its request for review, the Employer contended that it employed approximately 25 unit employees on the four jobsites, and in its representation petition the Petitioner stated that there were approximately 17 unit employees. The Regional Director made no finding in this regard.

[4] The *Excelsior* list dated December 24, 1997, contained 39 names, and the Employer added an additional name in a subsequent letter to the Regional Office.

[1] S*an Diego Gas & Electric*, 325 NLRB 1143 (1998).

party seeking to alter that procedure has the burden of demonstrating that the Regional Director abused his or her discretion. In the instant case, the Employer has failed to meet this burden. To the contrary, I agree with the majority that the record here establishes that a mail ballot election is appropriate.

MEMBER HURTGEN, dissenting.

I would grant the Employer's request for review.

The Regional Director (RD) has failed to set forth her rationale for holding a mail ballot election.

Under the prudent and traditional practices of this Agency, a manual ballot election is strongly preferred, and a mail ballot election is the limited exception. Accordingly, at a minimum, the Regional Director should set forth the facts and rationale for conducting a mail ballot election. In this way, the parties can intelligently argue, before the Board, that the Regional Director was correct/incorrect. Further, the Board cannot intelligently decide this issue unless it knows the bases for the Regional Director's decision. Accordingly, absent an articulated rationale for the Regional Director's decision, I would not uphold it.

My colleagues concede that the Board cannot review a Regional Director's mail ballot decision, under an "abuse of discretion" standard, unless the Regional Director sets forth the reasons for her decision. However, my colleagues then proceed to substitute their own discretion for that of the Regional Director. In my view, this is incorrect. In a system that depends upon the discretion of the person on the scene, the appropriate procedure would be to remand and permit that person to exercise her discretion and give reasons for her decision. It is incorrect to have the discretion exercised by people in Washington, far from the scene.[1]

The above problem is particularly acute in the instant case, for the decisionmakers in Washington are not sure of the relevant facts. They do not know the size of the work force. They say that it "appears" that a "substantial number" of eligible voters are not now employed by the Employer at Dade County sites. Further, even assuming arguendo the accuracy of the figures that they use (25 of 40 eligible employees work on Employer sites in Dade County), it is not known whether the other 15 work for the Employer outside of Dade County or for other employers. Nor do we know the location of the sites at which the 15 work. On the other hand, we *do* know that the 25 employees work at 4 Dade County sites, and thus could easily be reached by a single traveling Board agent. And, of the 40 eligible employees, all but 6 live in Dade County, and 5 of the 6 live in nearby Broward County.

In short, the sparse evidence that we have suggests that a manual election could be held. More importantly, the case cries out for a remand to ascertain the current facts, and to permit the RD to exercise discretion and to give reason therefor.[2]

[1] The concurring opinion defers to the discretion of the Regional Director. I disagree. Under a system of reposing discretion in Regional Directors, the Board is nonetheless charged with reviewing the exercise of discretion, in order to assure that there has been no abuse. I do not believe that the Board can fulfill its reviewing role in this regard if it does not know the basis for the Regional Director's decision.

[2] On a procedural point, my colleagues declare that the decision to hold a mail ballot election need not be contained in the Decision and Direction of Election (DDE). They cite no authority for that proposition. Further, they do not address at all the separate question of whether, and to what extent, the "mail ballot" issue is to be litigated. In my view, the "mail ballot" issue is sufficiently important to warrant consideration of it at the hearing and in the DDE. In that way, the Board can intelligently review the resolution of the issue if any party challenges it.